

United States District Court

For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

AMERICAN SMALL BUSINESS LEAGUE,

No. C 18-01979 WHA

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
DEFENSE and UNITED STATES
DEPARTMENT OF JUSTICE,

Defendants,

and

LOCKHEED MARTIN CORPORATION,

Defendant-Intervenor.

**ORDER ON MOTION TO
CONTINUE HEARING ON
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT
UNDER RULE 56(D)**

In this FOIA action, defendants United States Department of Defense and Department of Justice and defendant-intervenor Lockheed Martin Corporation (collectively, "defendants") jointly move for summary judgment on the issue of whether the information they seek to withhold is "confidential" within the meaning of Exemption 4 (Dkt. No. 107). Plaintiff American Small Business League opposes the summary judgment motion and separately moves under Rule 56(d) for a continuance of a ruling on defendants' motion for summary judgment (Dkt. No. 114). This order follows full briefing. Pursuant to Civil Local Rule 7-1(b), this order finds plaintiff's motion under Rule 56(d) suitable for submission without oral argument and hereby **VACATES** the hearing scheduled for September 18.

1 A prior order dated March 8 on the parties' earlier cross-motions for summary judgment
2 has set forth the detailed background of this action (Dkt. No. 58). In brief, plaintiff, a non-profit
3 organization that promotes the interests of small businesses, seeks the disclosure of various
4 documents related to (as relevant here) Lockheed Martin, Sikorsky Aircraft Corporation, and
5 GE Aviation's involvement with the Department of Defense's Comprehensive Subcontracting
6 Plan Test Program (*see* Dkt. No. 20 ¶ 21). Defendants argue that the information plaintiff seeks
7 is exempt from disclosure under Exemption 4 — which, as relevant here, protects from
8 disclosure “trade secrets and commercial or financial information obtained from a person and
9 privileged or confidential.” 5 U.S.C. § 552(b)(4). The prior order on the parties' cross-motions
10 for summary judgment found that issues of fact regarding whether disclosure would cause
11 competitive harm precluded both parties' cross-motions for summary judgment on the
12 Exemption 4 issue (Dkt. No. 58 at 9–11).

13 On June 24, the Supreme Court in *Food Marketing Institute v. Argus Leader Media*, 139
14 S. Ct. 2356 (2019), altered the Exemption 4 standard. The Supreme Court rejected the
15 “competitive harm” test adopted by our court of appeals (among many appellate courts) and
16 held that “[a]t least where commercial or financial information is both customarily and actually
17 treated as private by its owner and provided to the government under an assurance of privacy,
18 the information is ‘confidential’ within the meaning of Exemption 4.” *Id.* at 2366.

19 In light of *Food Marketing*, defendants again move for summary judgment on the
20 Exemption 4 issue, and plaintiff seeks discovery under Rule 56(d) and a continuance of the
21 hearing on defendants' motion. Defendants oppose plaintiff's Rule 56(d) motion, describing
22 the request as a “fishing expedition” (Dkt. No. 123 at 1). They accuse plaintiff of seeking
23 discovery based on a “speculative, unsupported belief that the declarants are not being truthful”
24 (*ibid.*). Notwithstanding plaintiff's overheated rhetoric, however, this order agrees that
25 discovery is warranted here.

26 Rule 56(d) (formerly Rule 56(f)) provides that “[i]f a nonmovant shows by affidavit or
27 declaration that, for specified reasons, it cannot present facts essential to justify its opposition,
28 the court may . . . allow time to obtain affidavits or declarations or to take discovery.” Fed. R.

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1 Civ. P. 56(d). Rule 56(d) requires a party to “specifically identify relevant information, and
 2 where there is some basis for believing that the information sought actually exists.” *Church of*
 3 *Scientology of San Francisco v. I.R.S.*, 991 F.2d 560, 563 (9th Cir. 1993), *vacated in part on*
 4 *other grounds*, 30 F.3d 101 (9th Cir. 1994) (directing the district court to, *inter alia*, “provide
 5 the plaintiffs . . . reasonable opportunity to conduct discovery relevant to applicability of the
 6 FOIA exemptions” under Rule 56(f)). “In general, a denial of a Rule 56[(d)] application is
 7 disfavored where the party opposing summary judgment makes a timely application which
 8 specifically identifies relevant information, and where there is some basis for believing that the
 9 information sought actually exists.” *Id.* at 562.

10 Relevant to defendants’ motion for summary judgment, defendants must show, at a
 11 minimum, that the relevant companies customarily and actually treated as private all of the
 12 information at issue to prevail on the Exemption 4 issue. *Food Marketing*, 139 S. Ct. at 2363.
 13 In support, defendants filed numerous declarations by various declarants who testified that the
 14 relevant companies customarily and actually kept said information private and disclosed the
 15 information to the government under the assurances of privacy. Plaintiff seeks to depose those
 16 declarants.*

17 Defendants make much of their assertions that discovery in FOIA litigation is typically
 18 limited; that the government’s burden of demonstrating the application of an exemption is met
 19 where the agency submits declarations that “contain reasonably detailed descriptions of the
 20 documents and allege facts sufficient to establish an exemption,” *Lane v. Dept. of Interior*, 523
 21 F.3d 1128, 1135–36 (9th Cir. 2008) (quoting *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987));
 22 and that declarations submitted by an agency “are presumed to be in good faith,” *Hamdan v.*
 23 *U.S. Dep’t of Justice*, 797 F.3d 759, 772 (9th Cir. 2015) (Dkt. No. 123 at 2). In other words,

24
 25 * Specifically, plaintiff seeks the following discovery (Dkt. No. 114 at 4–5):

26 ASBL noticed (and subpoenaed, in the case of Ms. Buffler) depositions of: (1) Susannah
 27 Raheb (an LMC employee and declarant); (2) Janice Buffler (a former DOD employee
 28 and declarant); (3) Martha Crawford (a Sikorsky employee and declarant); (4) Maureen
 Schumann (an LMC PR employee); (5) William Phelps (an LMC PR employee); (6) a
 Person Most Qualified from LMC pursuant to Rule (30)(b)(6); and (7) a Person Most
 Qualified from DOD pursuant to Rule (30)(b)(6) [*sic*].

1 defendants argue that discovery in FOIA litigation “is never justified absent a demonstration by
2 the moving party that the sworn declarations submitted in support of the other side’s motion for
3 summary judgment are lacking in good faith or otherwise not trustworthy” (*id.* at 4).

4 Even assuming these standards apply, plaintiff has met them. Take, for example, the
5 declaration of Susannah L. Raheb, Lockheed Martin’s Senior Manager for Supplier Diversity
6 and Regulatory Compliance. Raheb states that Lockheed Martin keeps compliance reports
7 (such as the 640 audits), which “detail[] all aspects of the [Lockheed Martin] Supplier Diversity
8 program, initiatives, performance to goals, strategic supplier partnerships, success stories of
9 supplier contract awards, etc.,” private (Dkt. No. 107-5 ¶ 49). But then she later waffles, further
10 stating that (*id.* ¶ 50 (emphasis added)):

11 On occasion, where LMC receives a positive performance evaluation, *LMC*
12 *may choose to publicize certain limited details of such evaluation* to tout its
13 success *in an attempt to attract more small businesses with which to*
14 *subcontract*. These decisions are made on a *case-by-case basis*, however,
15 and LMC’s decision in a particular instance to waive the confidentiality of
16 a positive adjectival rating contained within a performance evaluation does
17 not change the confidential nature of performance evaluations generally,
18 which LMC does not make public.

19 That is, when it made Lockheed Martin look good, the company issued press releases
20 “recogniz[ing] . . . small business suppliers that made exemplary contributions” to its products
21 and services (e.g., Dkt. No. 113-1 at 1). Those press releases included both the names of the
22 small business suppliers and Lockheed Martin’s performance rating for that year (e.g., *id.* at 1–2
23 (“The company was recognized with the Defense Contract Management Agency’s highest
24 possible rating for its 2017 performance and commitment to a diverse and inclusive supplier
25 base.”)).

26 As plaintiffs point out, Lockheed Martin’s selective disclosure of supposed confidential
27 information (i.e., supplier names, performance to goals, strategic supplier partnerships, success
28 stories of supplier contract awards) undercuts its vague contention that the company
“customarily” treats said information as confidential (Dkt. Nos. 114-1 ¶ 2a; 125 at 7). The
trustworthiness of the Raheb declaration is further chipped away by her statement in the next
breath that Lockheed Martin customarily keeps purchase orders, including supplier names
(among other things), private “because it could be used by competitors to target and award work

1 to [Lockheed Martin] suppliers, thereby making them unavailable, or less available, to work on”
2 its contracts (Dkt. No. 107-5 ¶¶ 51–53). In other words, according to Raheb, Lockheed Martin
3 simultaneously keeps private its supplier names to protect against poaching and freely discloses
4 its “exemplary” suppliers to attract more suppliers. These explanations do not square. Vague
5 statements and discrepancies such as these sufficiently demonstrate that certain limited
6 discovery is warranted under Rule 56(d).

7 Accordingly, plaintiff’s motion is **GRANTED** to the following extent. Plaintiff may take
8 up to **THREE DEPOSITIONS**. Plaintiff must file a supplemental brief in connection with
9 defendants’ motion for summary judgment by **OCTOBER 18 AT NOON**. Defendants may file a
10 response by **OCTOBER 25 AT NOON**. Both sides’ briefs shall be limited to **FIVE PAGES** and all
11 attachments, exhibits, and declarations shall be limited to **FIFTY PAGES**. Defendants’ motion for
12 summary judgment on the Exemption 4 issue is **HELD IN ABEYANCE** pending discovery and will
13 be heard on **NOVEMBER 14 AT 8 A.M.**

14 **IT IS SO ORDERED.**

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16 Dated: September 15, 2019.

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19 WILLIAM ALSUP
20 UNITED STATES DISTRICT JUDGE
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